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May 27, 2004

Via Electronic Filing

Marlene H. Dortch
Secretary
Federal Communications Commission
445 12th Street, SW
Washington, D.C. 20554

Re: *Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, CC Docket No. 01-338, et al., Petition for Waiver (filed February 11, 2004).

Dear Ms. Dortch:

BellSouth provides this response to claims made by AT&T in a letter dated May 7, 2004. AT&T makes two accusations against BellSouth, which it claims, in an abstruse way, support the denial of BellSouth's request for waiver filed on February 11, 2004. These claims, however, actually support BellSouth's premise – that in order to avoid uncertainty in the market, especially in the face of gamesmanship being played by CLECs such as AT&T, the Commission should waive the commingling rules until a determination is made regarding impairment of high-capacity loops.

BellSouth's waiver was based on a matter of efficiency. In the *TRO*, the Commission found that CLECs could offer unbundled network elements ("UNEs") and access services on a commingled basis, which would allow CLECs to transfer many access services to UNEs. The *TRO* also, however, established a process for state commissions to determine whether a CLEC was impaired without access to specific high capacity routes. Because negotiation of the amendments to interconnection agreements was progressing faster than the state proceedings, BellSouth sought a waiver of the commingling requirement until the state proceedings had concluded to avoid the costs of converting some circuits to UNEs only to have them converted back to special access if the state commission found no impairment. Before the Commission acted on the waiver, the D.C. Circuit issued its opinion on the *TRO* vacating significant portions of the *TRO*, including the delegation of authority to state commissions to make impairment determinations. This decision, though rightly decided, has caused a significant amount of uncertainty regarding the unbundling rules, including the impairment determination of high capacity loops. For this reason, BellSouth asked the Commission to grant the waiver until some

certainty had been restored to the market even though the state proceedings were no longer going forward in many jurisdictions.

In opposition to BellSouth's waiver request, AT&T's letter distorts the facts and uses half-truths to paint BellSouth in an unfavorable light in the adoption of an amendment to AT&T's interconnection agreement with BellSouth. AT&T then concludes that, based on the facts as it has presented them, the Commission should deny BellSouth's waiver. Once the rest of the story is revealed, it is obvious that AT&T's ad hominem attacks add nothing to the debate and should be summarily dismissed from consideration.

First, AT&T accuses BellSouth of improper negotiation tactics, claiming that BellSouth is disallowing AT&T to adopt a limited section of BellSouth's SGAT in Georgia related to commingling. What AT&T fails to tell the Commission is that the commingling section it sought to adopt is but one small part of the entire spectrum of changes that BellSouth drafted into the SGAT to effectuate changes resulting from the *TRO*. Moreover, the commingling section cited by AT&T in its letter is exactly the same commingling section that was part of the proposed language forwarded to AT&T during the negotiation of its new Interconnection Agreement for the state of Georgia. Both AT&T and BellSouth agreed that the negotiations of the new Interconnection Agreement would encompass the negotiation for the new provisions necessary as a result of the *TRO*. Moreover, pending the completion of the negotiation of the new interconnection agreement, BellSouth is, and has been, willing to amend AT&T's existing interconnection agreement to include all changes resulting from the *TRO*. Consistent with the Commission's rules, however, any amendment to the existing agreement, even if adopted from the SGAT, must include all necessary provisions relevant to the *TRO*. AT&T cannot as it proposes, amend only the sections that it deems favorable to itself.

AT&T is fully aware that it must adopt all terms that are "legitimately related" to the desired network element, interconnection arrangement or service when requesting an adoption under Section 252(i). The Commission adopted this principle in its pick and choose rules[1] and the Supreme Court approved it in the *Iowa Utilities Board* decision.[2] AT&T is simply trying to cherry-pick a specific term from the entire group of *TRO* rulings that are all legitimately related to the commingling term that AT&T wants to unilaterally adopt. Stated simply, AT&T wants to adopt the favorable terms from the *TRO* while eschewing the terms that are not favorable to it. AT&T is well aware of these pick and choose rules and principles and has dissembled the facts in an attempt to have the Commission believe that BellSouth is engaging in self-help remedies. This claim is completely untrue; and, it bolsters the fact that the Commission should grant BellSouth's waiver because it demonstrates that carriers are not above sophistic claims in order to adopt only the parts of the *TRO* that suit their purposes.

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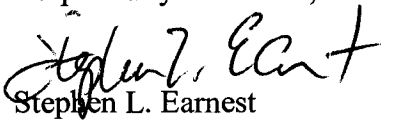
1 *Implementation of the Local Competition Provisions of the Telecommunications Act of 1996; Interconnection between Local Exchange Carriers and CMRS Providers*, CC Docket Nos. 96-98 & 95-185, *First Report and Order*, 11 FCC Rcd 15499, 16139, ¶ 1315 (1996).

2 *AT&T v. Iowa Utilities Board*, 525 U.S. 366, 396 (1999).

AT&T next claims that BellSouth has threatened to unilaterally terminate its interconnection agreements with carriers once the D.C. Circuit's vacatur of the *TRO* becomes effective. AT&T cites a letter BellSouth posted on its website wherein BellSouth offered to negotiate a replacement of UNE transport with special access services. This offer was in response to Chairman Powell's call for carriers to enter into commercial negotiations. To provide stability and assurances for CLECs, such as AT&T, BellSouth offered a transition plan for CLECs' continued access to high capacity dedicated transport and high-capacity loops during the transition period in hopes that its CLEC customers would consider BellSouth as their provider of these special access services. BellSouth has never indicated to AT&T, or any carrier for that matter, that it will unilaterally breach its obligations under its interconnection agreements, and it is not BellSouth's intent to do so.

BellSouth does not deny that vacatur would relieve BellSouth of the obligations under the Telecommunications Act of 1996 to continue to offer high-capacity – DS1 and above – loop and transport elements at state-mandated TELRIC rates. And, after June 15, 2004, if the court's decision goes into effect, BellSouth would pursue its legal and regulatory options to move these elements to an appropriate service arrangement. All such options, however, would be pursuant to established legal processes and would not, as AT&T suggests, include breach of contract or unilateral repudiation of BellSouth's interconnection agreements. [3]

Respectfully submitted,



Stephen L. Earnest

SLE:lb
Attachments
cc: Christopher Libertelli
Matthew Brill
Daniel Gonzalez
Scott Bergmann
Jessica Rosenworcel
William Maher
Jeffery Carlisle
Michelle Carey
Thomas Navin
Jeremy Miller
Ian Dillner
Robert Tanner

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[3] BellSouth filed an updated carrier notice on its interconnection website on May 24, 2004. This update clarifies any questions that any carrier may have about BellSouth's position on this matter. This carrier notification is not a change in BellSouth's position, but merely a clarification of the original intent of the first carrier notification. A copy of that letter is included as Attachment 1.

CC Docket No. 01-338

ATTACHMENT 1

BellSouth Interconnection Services
675 West Peachtree Street
Atlanta, Georgia 30375

Carrier Notification
SN91084106

Date: May 24, 2004

To: Facility-Based Competitive Local Exchange Carriers (CLEC)

Subject: Facility-Based CLECs – (Business/Operations Process) - Provision of Service to CLECs Post-Vacatur

The District of Columbia Circuit Court of Appeals' March 2, 2004, Opinion vacating certain Federal Communications Commission (FCC) Unbundled Network Element (UNE) rules is scheduled to become effective on June 16, 2004. This letter is to affirm that BellSouth will not unilaterally breach its interconnection agreements. Upon vacatur of the rules, BellSouth does intend to pursue modification, reformation or amendment of existing Interconnection Agreements (with the exception of new commercial and transition agreements) to properly reflect the Court's mandate. Rumors have been circulating that, upon vacatur, services that BellSouth now provides to CLECs under their Interconnection Agreements will be disconnected. Contrary to such rumors, if the rules are vacated, BellSouth will not, as a result of the vacatur, unilaterally disconnect services being provided to any CLEC under the CLEC's Interconnection Agreement.

If you have any questions, please contact your BellSouth contract manager.

Sincerely,

ORIGINAL SIGNED BY KRISTEN ROWE FOR JERRY HENDRIX

Jerry Hendrix – Assistant Vice President
BellSouth Interconnection Services